Office Supreme Court, U. S.
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DEC 23 1907
JAMES H. McKENNEY,
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No. 164.

Supreme Court of the United States

OCTOBER TERM, 1907.

W. H. GAZLAY, HANNA F. GAZLAY, HULDA G. MILLER, EMMA G. DONALDSON, JULIA G. STEWART and CLARA G. KUHN,
Appellants,

versus

FLETCHER R. WILLIAMS, Trustee of Harry D. Brown, a Bankrupt,
Appellee.

Brief on Behalf of Appellants.

OSCAR W. KUHN,
Counsel for Appellants.

THE COURT INDEX PRESS, Law Printers, 806 Main Street, Cincinnati, Ohio.

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W. H. GAZLAY, HANNA F. GAZLAY, HULDA G. MILLER, EMMA G. DONALDSON, JULIA G. STEWART and CLARA G. KUHN,

Appellants,

No. 164. *vs.*

FLETCHER R. WILLIAMS, Trustee of Harry D. Brown, a Bankrupt,

Appellee.

Brief on Behalf of Appellants.

STATEMENT OF THE CASE.

On the 16th day of June, 1902, W. H. Gazlay, H. F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, the appellants herein and hereinafter called the lessors, entered into a written agreement with one J. D. Kueny, whereby in considera-

tion of the rents to be paid and the covenants to be performed by said lessee, his heirs and assigns, they leased to said Kueny certain premises situated on the east side of Vine street, south of Sixth street, Cincinnati, Ohio, for a period of ten years, with the privilege of ten years additional. (See record, pages 10 to 13.)

The lease contains the following condition:

> "Provided, however, that if said lessee shall assign this lease or underlet said premises, or any part thereof, or if said lessee's interest therein shall be sold under execution or other legal process, without the written consent of said lessors, their heirs or assigns, is first had, or if said lessee or assigns shall fail to keep any of the other covenants of this lease by said lessee to be kept, it shall be lawful for said lessors, their heirs or assigns, into said premises to re-enter and the same to have again, repossess and enjoy as in their first and former estate, and thereupon this lease and everything therein contained on the said lessors' behalf to be done and performed, shall cease, determine, and be utterly void."

On the 9th of April, said lessors filed a petition in the Superior Court of Cincinnati, Ohio, and thereby began a suit against the said J. D. Kueny for the recovery of rent due under said lease. In their petition the lessors asked that a receiver be appointed to take charge of all the property of said J. D. Kueny, including said leasehold estate, *and that said leasehold premises and the unexpired term be sold, "subject, however, to all the terms, covenants and conditions contained in the lease from*

said plaintiffs to said J. D. Kueny" (Record, p. 7). Thereupon the court appointed receivers to take charge of and manage said property, and later made an order directing said receivers to sell all of the personal property of said J. D. Kueny, including the leasehold estate, and under said order all of said property including said leasehold estate was sold to H. D. Brown, who took possession of same, made extensive improvements thereon and paid to the lessors the rent reserved under said lease, from the time he took possession, to-wit, July, 1905, to January, 1906, when proceedings were begun against him in the U. S. District Court for the Southern District of Ohio, Western Division, to have him adjudged a bankrupt.

Pending the adjudication, a receiver was appointed, who took charge of all of Brown's property, including said leasehold estate, and who, as such receiver, paid to said lessors the rent reserved in said lease for the month of January, 1906.

In February, 1906, the appellee herein, Fletcher R. Williams, was elected as trustee in bankruptcy of the estate and effects of said Brown and on March 1st, 1906, he filed in the bankruptcy proceedings an application for the sale of said leasehold estate, making the lessors parties thereto, and asking that they be required to set up any claim they might have upon the same. Subpoenas were issued and served upon all but one of the lessors on March 5th, 1906, and on that one on March 9th, 1906.

On March 6th, 1906, said trustee paid to W. H. Gazlay rent for the month of February, 1906, the amount paid being the monthly sum named in the said lease. There-

upon said lessors, coming in for the purposes of the motion only, filed a motion to be dismissed from the proceedings on the ground that the court had no jurisdiction over their persons, which motion was overruled by the referee in bankruptcy, and exception thereto taken by said lessors. Thereupon the lessors filed an answer in which, still denying the jurisdiction of the court over their persons,they alleged that as their claim was founded upon the clause in the lease providing "that if lessee's interest should be sold under execution or other legal process without the written consent of said lessors, it would be lawful for the lessors to repossess themselves of said premises, and thereupon the lease should be void," and that as the event therein provided had not happened they had no interest in or claim upon said leasehold estate at that time, and asked to be dismissed as parties to said application.

The case was then submitted to the referee upon these pleadings an agreed statement of facts (Record, pp. 6 to 10), the arguments and briefs of counsel.

Whereupon the referee found that the trustee being in lawful possession of said leasehold estate, the court had jurisdiction of the persons and subject-matter of the suit; that the claim of the lessors, assuming that they had one and that it would be enforceable only after a sale, nevertheless was in the nature of a cloud upon the title of the trustee to said leasehold estate, and, as such, could be determined in this proceeding in advance of its happening, and he thereupon held that the lessors had no right as against the trustee in bankruptcy herein to forfeit the lease in the event of a sale by him under the

court's order and ordered said trustee to sell same free from any claim or right on the part of said lessors to forfeit same. To these findings and this judgment of the referee, the lessors took exception and filed a petition for a review of same in the District Court in Bankruptcy. The referee certified his proceedings to the District Court of the United States for the Southern District of Ohio, Western Division, where, upon a hearing on the same pleadings (except that appellee filed a reply to appellants' answer), and facts, an order was made affirming the findings and judgment of the referee, and dismissing the said petition for review.

From this judgment of the District Court, the lessors took an appeal to the United States Circuit Court of Appeals for the Sixth Circuit. There the cause was again submitted upon the same pleadings and facts upon which it was submitted to the District Court, and that court affirmed the judgment of the District Court affirming the judgment of the referee and wrote an opinion which is set out in full in the record herein (Record, pp. 31 to 37), the point of their decision being that the clause in said lease providing for its forfeiture in case of a sale of same under execution or other legal process without the lessors' written consent thereto, had no application to a sale by the trustee in bankruptcy and that therefore the lessors could not forfeit the lease in case the trustees herein should sell same.

From this judgment of the Circuit Court of Appeals, the lessors have prosecuted an appeal to this court, and have filed herein all of the pleadings, exhibits and the

evidence, together with their assignments of error—all of which have been printed and are before the court.

ASSIGNMENTS OF ERROR.

Said assignments of error are as follows:

First. The said court erred in affirming the judgment of the District Court of the United States for the Southern District of Ohio, Western Division, ordering that the petition of the said W. H. Gazlay et al to review the findings and orders of the referee in bankruptcy should be dismissed.

Second. The court erred in affirming the finding of the District Court of the United States for the Southern District of Ohio, Western Division, that the appellants had no right to forfeit the lease of said Harry D. Brown in the event of a sale of same under the application of the trustee in bankruptcy herein, because he was not expressly named in the prohibition against alienation in said lease.

Third. The court erred in affirming the judgment of the District Court of the United States for the Southern District of Ohio, Western Division, that the appellants could not assert the right of forfeiture as against the trustee in bankruptcy herein because by their proceedings in the Superior Court of Cincinnati against J. D. Kueny, the original lessee of the said premises, under which proceedings the said leasehold estate was sold to the said Harry D. Brown, they had forever discharged the lease from the condition providing for a forfeiture of the lease in case said leasehold interest should be sold on

execution or other legal process without the written consent of the lessors, the appellants herein.

Fourth. The court erred in affirming the judgment of the District Court of the United States for the Southern District of Ohio, Western Division, that the trustee in bankruptcy was entitled to sell said leasehold estate clear and free from any claim or right on the part of appellants to forfeit same in the event of a sale.

After said appeal was filed in this court, some question having been made as to their right to appeal, appellants filed and submitted a petition for a *writ of certiorari*, asking the court if it should find that the appeal was not well taken, to order certified to this court a complete transcript of the record and all the proceedings of the Circuit Court of Appeals in said case and to review and determine the case under that proceeding.

This petition for a *writ of certiorari* was filed in accordance with the practice of this court as allowed in the cases of *Whitney, Warden,* v. *Dick*, 202 U. S., 132; *Pullman Palace Car Co.* v. *Cent. Transp. Co.*, 171 U. S., 138; *Security Trust Co.* v. *Dent*, 187 U. S., 237, 239. Afterwards appellee filed and submitted a motion to dismiss the appeal on the ground that it was not taken in time. Appellants filed a brief in answer to said motion showing not only that the appeal was prosecuted in time but also as a matter of right. Decision on this motion of appellee to dismiss and on the petition of appellants for a *writ of certiorari* was postponed until the hearing of the cause.

The court is respectfully referred to the brief of appellants in answer to appellee's motion to dismiss, for

the reasons why said appeal was not only taken within time but rightly so, and no argument upon these matters is made in this brief.

ARGUMENT.

It will be well to point out at the outset of the argument that the lease involved in this case contains two provisions against alienation—one against a voluntary assignment of it, *i. e.*, by the act of the lessee and the other against an involuntary assignment or sale of it on execution or other legal process, and that it is only with the provision against a sale of it under execution or other legal process with which this case is concerned.

This being premised, the questions presented for determination by this court are:

1st. Is the condition of said lease that "if lessee's interest therein shall be sold under execution or other legal process, without the written consent of the lessors, their heirs or assigns, is first had, it shall be lawful for said lessors into said premises to re-enter and the same to have again, repossess and enjoy as in their first and former estate and that thereupon this lease shall cease, determine and be utterly void," a valid condition, and

2d. If so, have the lessors the right to forfeit the lease in case the trustee in bankruptcy herein sells the same upon his application for an order to do so?

I.

THERE CAN BE NO DOUBT UNDER THE AUTHORITIES THAT, AS BETWEEN THE ORIGINAL PARTIES TO THIS LEASE, THE CONDITION, VIZ., "THAT IF LESSEE'S INTEREST SHOULD BE SOLD UNDER EXECUTION OR OTHER LEGAL PROCESS WITHOUT THE LESSORS' WRITTEN CONSENT, IT MIGHT BE FORFEITED BY THE LESSORS," WAS A LAWFUL AND VALID CONDITION AND, IN THE EVENT OF SUCH A SALE, WOULD HAVE RENDERED THE LEASE VOIDABLE IN THE HANDS OF THE PURCHASER.

Farnum v. *Heffner*, 79 Cal., 575.
Rex. v. *Tapping*, McClel. & Y., 544.
Davis v. *Eyton*, 4 M. & P., 820.
Doe v. *Clark*, 8 East., 185.
In re Ells, 98 Fed. Rep., 967.
Tiffany on Real Property, p. 106.
1 Taylor Landlord and Tenant, 409.

II.

HAVE THE LESSORS THE RIGHT TO FORFEIT THIS LEASE IN THE EVENT OF ITS SALE BY THE TRUSTEE HEREIN UNDER HIS APPLICATION FOR AN ORDER OF THE COURT TO DO SO, *i. e.*, IS THE ABOVE CONDITION STILL IN FORCE AS BETWEEN THE LESSORS AND THE TRUSTEE IN BANKRUPTCY?

Whether the lessors may or may not forfeit the lease in case of a sale of it by the trustee will depend upon the title that Brown, the bankrupt, took under his purchase from the receivers in the Superior Court proceedings; *i. e.*,

upon whether he took the lease *subject to* or *free from* the condition relating to a sale under legal process.

From the agreed statement of facts it appears that the lessors themselves filed the petition in that case, asking for a sale of the leasehold estate of the original lessee Kueny, to pay their claim for rent under the lease, "*subject, however, to all of the terms, covenants and conditions contained in said lease.*"

This was a written request by the lessors that the lease should be sold subject to all of its terms, covenants and conditions, and it may even be conceded that it was a written consent to its sale upon those terms; but neither in the petition nor in any other pleading in the case did the lessors request or consent to the sale of the leasehold estate free from such terms, covenants and conditions.

Upon this petition an order was issued out of said court directing the receivers to sell the leasehold estate, and under said order it was sold to Harry D. Brown; but the order of sale did not *in terms* provide that it was to be *subject to all of the terms, covenants and conditions of the lease;* nevertheless, it is submitted, that the purchaser, Brown, took the leasehold estate *subject to all of the terms, covenants and conditions of the lease*, for the reasons:

1st. That the court's order must be construed to follow and harmonize with the pleadings in the case, and to grant only such relief as the pleadings and the facts of the case warranted. Therefore, when the order issued, directing a sale of the "leasehold estate," it must

necessarily have contemplated the leasehold estate the sale of which was asked for in the petition, and which was a leasehold estate *subject to all of the terms, covenants and conditions of the original lease;* and, indeed, such a sale was the only one to which the plaintiffs were entitled under the petition and the other pleadings in the case.

2d. That when two constructions of a decree are possible, a court must adopt the one which will accomplish the objects and purposes of the suit rather than the one which will defeat them.

Since the petition in the Superior Court case asked for the sale of the leasehold estate subject to all of the terms, covenants and conditions of the lease, it is manifest that the objects and purposes of the suit were the enforcement of the lessors' lien for rent by a sale of the leasehold estate *subject to all of the terms, covenants and conditions of the lease*, in order that the lessors could still control the character of the tenancy of the premises and prevent its falling into objectionable or irresponsible hands, which it was the purpose of the provision requiring the lessors' written consent to the assignment or sale of the leasehold estate, to accomplish.

A sale of the leasehold estate, *subject to all of the terms, covenants and conditions of the lease*, was the only kind of a sale that would accomplish these objects and purposes, while a sale free from the terms, covenants and conditions of the lease would defeat those objects and purposes. Therefore we must construe the decree for sale as directing a sale *subject to the terms, covenants and conditions of the lease.*

Again, since the lessors did not give their written consent to a sale free from the terms, covenants and conditions of the lease, it follows that a sale free from those terms, covenants and conditions would have given the purchaser a title that would be voidable at the option of the lessors; while a sale subject to the terms, covenants and conditions of the lease would have given him a title that would not be voidable at the option of the lessors, and it therefore follows that the court's decree must be construed so as to confer a good title rather than one that is voidable only.

In view of the foregoing, it is submitted that by every intendment of the parties to the Superior Court case, and by every reasonable construction of the proceedings in it, Brown, the purchaser, took and held the leasehold estate *subject to all the terms, covenants and conditions of the original lease.*

That the sale of a leasehold estate subject to all of the terms, covenants and conditions of a lease, may be lawfully made, and when so made the purchaser takes the lease subject to such terms, covenants and conditions, was held in the case of *Kew* v. *Trainor*, 150 Ill., 150.

Having thus established that Brown took the leasehold estate subject to all of the terms, covenants and conditions of the lease, it remains to consider what effect his bankruptcy had upon his title.

The lease contains no provision for its forfeiture in the event of the bankruptcy of the lessee, therefore Brown's bankruptcy was not a violation of any of the provisions of the lease. Nor was the passing of Brown's

title to his trustee in bankruptcy a violation of any of the provisions of the lease relating to an assignment or sale of it, because this passing of the title to the trustee was accomplished not by a voluntary assignment nor by a sale under execution or other legal process, but solely by force of the Bankrupt Act, Sec. 70 (*a*) and therefore the lessors had no right to forfeit the lease in the hands of the trustee.

Watson v. *Merrill*, 14 Am. Bank. Rep., 453-458.
In re Curtis, 9 Am. Bank. Rep., 286.
In re Pennewell, 9 Am. Bank. Rep., 490.
Farnum v. *Hefner*, 79 Cal., 575.

But since, as has been shown, Brown held the leasehold estate *subject to all of the terms, covenants and conditions of the lease*, which made it liable to be forfeited in the event of its sale under legal process without the written consent of the lessors, and since the title of the trustee in bankruptcy is the same as that of the bankrupt, Brown, it follows that the trustee holds the title to the leasehold estate *subject to all of the terms, covenants and conditions of the lease*, and a sale of it by him under legal process without the lessors' written consent will make it liable to be forfeited in the hands of any purchaser at such a sale.

York Mfg. Co. v. *Cassell*, 201 U. S., 344.
Thompson v. *Fairbanks*, 196 U. S., 516.
Hewitt v. *Berlin Machine Works*, 194 U. S., 296.
Bankruptcy Act, Section 70 (*a*).

A sale of the leasehold estate by the trustee under his application for an order to sell will be a sale under legal

process, and since, as was shown above, the trustee holds the leasehold estate subject to all the terms, covenants and conditions of the lease, it follows that any such sale will be a breach of the condition relating to a sale under legal process and will give to the lessors the right to forfeit the lease in the hands of the purchaser.

Hence when the court below held that a sale of the leasehold estate by the trustee would not be a violation of any of the terms, covenants and conditions of the lease, it committed error for which its judgment, authorizing the trustee to sell, should be reversed.

The Circuit Court of Appeals held in this case that a sale of the leasehold estate by the trustee would be no breach of the condition in the lease relating either to a voluntary assignment of it or to a sale of it under execution or other legal process, because, since the lease made no provision for its forfeiture in case of the bankruptcy of the lessee, nor in case of the passing of the title to the trustee, and since the trustee's holding was solely for the purpose of sale, it could not have been in the contemplation of the parties to the original lease that a trustee in bankruptcy should be permitted to take the title to the leasehold estate, and yet not be permitted to dispose of it, at least without expressly providing that he should not (Record, p. 35).

This holding of the court, it is respectfully submitted, is not tenable for the following reasons:

1st. *It destroys and utterly nullifies the contract between the parties to the lease.*

The parties to the original contract of lease provided in it for its forfeiture in the event of any transfer of it whatsoever without the written consent of the lessors. Insofar as a voluntary transfer of it was contemplated the provision was "if lessee should assign the lease or underlet said premises or any part thereof," and insofar as it contemplated an involuntary transfer, the provision was "if said lessee's interest therein shall be sold under execution or other legal process."

A sale by a trustee in bankruptcy must be accomplished either by a voluntary transfer of the lease, *i. e.*, by an act of the trustee himself or by an involuntary transfer of it, *i. e.*, by an order of the court, which is by legal process; hence to exempt a sale by the trustee under legal process from the general clause prohibiting the sale would be not only wholly unwarranted but would be making a contract which the parties never made or intended.

2d. *It is in direct conflict with the holdings of this court in the cases of York Mfg. Co.* v. *Cassell, Hewitt* v. *Berlin Machine Works, and Thompson* v. *Fairbanks, supra, that the title of a trustee in bankruptcy is the same as that of the bankrupt; i. e., is subject to the same limitations and infirmities to which it was subject in the bankrupt's hands.*

Brown's title being, as shown above, subject to forfeiture in case of an assignment of the lease or in case of a sale under legal process without the lessors' written con-

sent, if the trustee's title is not subject to forfeiture in the event of a sale under legal process, it would give to the trustee greater rights in the leasehold estate than the bankrupt Brown had, which is contrary to reason and the decisions of this court, *supra*.

3d. *It opens the door to fraud.*

For a provision in a lease of the kind under consideration here could be evaded simply by the institution of bankruptcy proceedings against the lessee when the provisions would at once become inoperative and a transfer of the lease could be made notwithstanding objection on the part of the lessors.

4th. *It is not supported by the case of Doe* v. *Bevan, 3 M. & S., 553, upon which it was predicated by the court.*

For that was a case in which the provision in the lease relating to its alienation was expressly made to apply *only* to the case of a voluntary assignment by the lessee. It did not provide in any way for a forfeiture of it in the event of a sale under execution or other legal process, as is the case in the lease under discussion, and which is the sole question under consideration here.

The English court rightly held in that case that a sale by an assignee in bankruptcy would be no violation of the clause preventing an assignment of the lease by lessee or his assigns, because that clause contemplated a voluntary assignment only, while a sale of the lease by the assignee in bankruptcy was a purely involuntary proceeding, and not being forbidden by the lease furnished no ground upon which the lessor might forfeit.

There is nothing either in the facts of that case, nor in the opinions of the four lords who decided it, that has any bearing upon the facts in this case. For here we have an express clause in the lease providing for a forfeiture of it in case of an involuntary assignment or sale of it, which a sale under execution or other legal process would clearly be, which as above stated, was not in the lease which was before the court in the case of *Doe* v. *Bevan.*

5th. *It is based upon a mere assumption, viz: that the trustee in bankruptcy holds the title to the bankrupt's property solely and exclusively for the purpose of a sale of it.*

Section 47 of the bankruptcy act, which prescribes the duties of trustees, provides under subdivision (*a*) (2) that they shall collect and reduce to money the property of the estates for which they are trustees, under direction of the court. And Section 70 of the act, enumerating the cases in which a trustee takes title to the property of the bankrupt, provides under Subdivision (*a*) that "the trustee of the estate of a bankrupt, upon his appointment and qualification, * * * shall be vested by operation of law with the title of the banbrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (5) *property, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him.*

Having conclusively shown above that the title of the bankrupt, Brown, to the leasehold estate was only a qualified title, that is, was one that was subject to forfeiture in the event of an assignment of the lease by him or of a sale of it under execution or other legal process without the lessors' written consent thereto, it follows from the express provisions of Section 70 (*a*) of the bankruptcy act, viz., that the trustee in bankruptcy shall be vested with *the* title of the bankrupt, that he, the trustee, took and now holds the leasehold estate of the bankrupt, Brown, also subject to forfeiture in the event of an assignment or sale of it under legal process, without the written consent of the lessors.

To hold, therefore, that a trustee in bankruptcy takes the title to the bankrupt's property solely and exclusively for the purpose of a sale of it is in direct conflict with the express provisions of the bankruptcy act and a mere assumption.

Hence, from all of the foregoing, it is submitted, that the Circuit Court of Appeals erred in its judgment that a sale of the lease by the trustee in bankruptcy would be no breach of the condition in said lease relating to a sale of it under legal process, and that in case of such a sale by the trustee, the lessors, the appellants herein, would have no right to forfeit the lease in the event of such a sale by the trustee, and this court is respectfully asked to reverse that judgment.

Oscar W. Kuhn,

Counsel for Appellants.

Cincinnati, December 12th, 1907.

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APPELLANTS,

vs.

FLETCHER R. WILLIAMS, TRUSTEE OF HARRY D. BROWN, A BANKRUPT,

APPELLEE.

BRIEF ON BEHALF OF APPELLEE.

PROVINCE M. POGUE,
OF COUNSEL FOR APPELLEE.

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W. H. GAZLAY, HANNAH F. GAZLAY, HULDA G. MILLER, EMMA G. DONALDSON, JULIA G. STEWART and CLARA G. KUHN, Appellants,

vs.

FLETCHER R. WILLIAMS, TRUSTEE OF HARRY D. BROWN, A BANKRUPT, Appellee.

BRIEF ON BEHALF OF APPELLEE.

Having been advised by the Clerk of this Court that on October 28, 1907, this Court

> "Entered its order in case of Gazlay et al. vs. Williams, Trustee, etc., No. 164, Oct. Term, 1907, postponing both the motion to dismiss and the petition for certiorari until the case is reached for hearing on the merits,"

I trust it is my privilege to file a brief covering:

First. A reply to the brief of the appellants on the motion of the appellee to dismiss the appeal.

Second. Objections to allowing the writ of certiorari.

Third. The merits of the case.

I.

REPLY TO THE BRIEF OF THE APPELLANTS ON THE MOTION OF THE APPELLEE TO DISMISS THE APPEAL.

Just as Court convened on October 21, 1907, I was handed by the clerk a copy of a brief for the appellants in opposition to the motion to dismiss the appeal. Previous to that hour I had not the slightest intimation that counsel for appellants intended to file any brief on this motion, although my brief, heretofore filed and to the argument in which reference is made without repetition, had been served on him months before, as is shown by the official service on file in the offices of the clerk. Therefore, I had no opportunity to reply in writing or otherwise at the time of the hearing and submission of the motion to dismiss the appeal.

Counsel for appellants has cited only one authority in opposition to the motion to dismiss the appeal because it was not filed in time. It is the case of Hewitt vs. Berlin Machine Works.

That case did not have under consideration the question as to the time within which an appeal should be taken from the Circuit Court of Appeals nor was there anything of that kind involved in the proceedings. This is one of the essential points in the motion to dismiss the appeal; that is, the question of time, and while it may have been proper to have taken an appeal in the form as provided for in the act cited by counsel for the appellants, yet, under the statutes and the rule made by this Court, in accord therewith, the appeal in this case must be taken within thirty days.

Counsel for appellants says that Rule 36 does not apply to an appeal from the Circuit Court of Appeals, and that it applies only to an appeal from the District Court or Circuit Court to this Court. I do not know how I can make English any clearer than by repeating the rule, which says "Appeals under the act to the Supreme Court of the United States from a Circuit Court of Appeals . . . shall be taken within thirty days after the judgment or decree."

This clearly shows that the rule does apply to appeals from the Circuit Court of Appeals, and I insist applies to the case at bar.

Further this appeal should not be entertained, because the record does not show the findings of fact and conclusions of law to have been made by the Circuit Court of Appeals in accordance with Clause 3 of General Order No. 36, reading as follows:

> "In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law."

No findings of fact or conclusions of law were made in the case by the Circuit Court of Appeals, nor do the records show that there was any request to make any such finding. The appeal was a general one and in accordance with the recent opinion of this Court in the case of Chapman vs. Bowen, decided November 11, 1907, this appeal should be dismissed.

I submit the appeal was not prosecuted in time, as urged in my brief on the motion to dismiss, nor was it prosecuted in proper form.

II.

OBJECTION TO ALLOWING THE WRIT OF CERTIORARI.

On the 16th day of June, 1906, the decree was entered in the Circuit Court of Appeals.

This Court convened in October, 1906, and held a continuous session until the latter part of May, 1907. In all that period no application was made by the appellants for a writ of certiorari. It was not until after the Court had adjourned, to-wit, June 13, 1907, that an application was made, within four days of the expiration of a year from the time of the judgment in the Circuit Court of Appeals. While I am cognizant of the fact that this Court in the case of the Conquerer, 166 U. S., 114, has made a ruling that the application for the writ of certiorari, made in that case within a year, was a reasonable time, yet I do not believe that that ruling should be allowed to apply to the same character of writs in bankruptcy cases. The purpose of the bankruptcy act is to shorten the proceedings as much as possible, so as to bring all of the proceeds of the bankrupt into court and have a distribution made promptly.

This purpose of the bankruptcy act is further strengthened by Rule 36 of this Court, passed with reference to appeals, and if you consider the matter simply as to time, I submit that the act of the appellants in delaying the application for this writ for so long a period should not be countenanced, and that the writ should, therefore, not be granted by reason of their long delay.

Nor can the reason be important enough in this case to extend it to come within the opinion heretofore announced by this Court when it said:

> "Only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and courts of state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."
>
> Forsyth vs. Hammond, 166 U. S., 514.

The appellants should be governed as to their rights by the decision of the Circuit Court of Appeals, and this writ should not now be granted after so long a delay, and especially so when the appellants have prosecuted another proceeding and deliberately delayed filing the petition for a writ of certiorari, thereby preventing the parties from reaching a conclusion of this litigation at a date long prior to the time of this hearing. Such conduct and such delay should not be countenanced.

Where it becomes necessary, in the administration of the property of a bankrupt estate in the *possession of the trustee*, as in this case, to bring in third parties for the purpose of adjudicating the title or interest of such parties in that property, a proceeding instituted by the trustee to that end is not a controversy arising in bankruptcy, but is a proceeding in bankruptcy proper. That is the case at bar.

> First Nat. Bk. vs. Title & Trust Co., 198 U. S., 280.
> Whitney vs. Wenman, 198 U. S., 539.

In re McMahon, 147 Fed., 685.
Morgan vs. First Nat. Bk., 145 Fed., 466.

The decision of the court of bankruptcy under the facts just above mentioned can not be reviewed on appeal, but must be on petition for revision.

Louisville Trust Co. vs. Comingor, 184 U. S., 18.
Schweer vs. Brown, 195 U. S., 171.
First Nat. Bk. vs. Title & Trust Co., 198 U. S., 280.

Having sought to review this case, by a form of proceeding which they thought proper, and now realizing that that proceeding was not proper, they should not be permitted to tie up a bankruptcy case in this matter. They elected their remedy and should be estopped.

I respectfully submit the petition should not be granted.

III.

THE MERITS OF THE CASE.

STATEMENT OF THE CASE.

A statement of the case, so far as it was necessary for the purposes of the motion to dismiss the appeal, has already been made in the brief heretofore filed herein. For the present purposes I only desire to add to what has been said therein by calling the Court's attention to the fact that the appellants have not brought the entire record in this case to this Court or the Circuit Court of Appeals, as the same was before the district court and referee, because a number of the exhibits, 1 to 16, which are important, are missing. (Record 8.) So that this Court could not have under its consideration the evidence before the referee and district court, on which it based its findings. (Record, pp. 19, 20.)

ARGUMENT.

The points involved in the merits of the case may be divided for discussion under five heads:

First. The district court had jurisdiction and could make the lessors, the appellants, parties to this action to determine the matters in controversy.

Second. This was a proceeding in bankruptcy to determine the rights and claims of the lessors and the trustee as to their respective interests in the leasehold estate of the bankrupt, and was in the nature of a suit to quiet the title thereto in the trustee.

Third. If the district court had jurisdiction, then the lessors have lost their right of forfeiture, if a sale is made by the trustee in these proceedings, by reason of the action instituted by them in the Superior Court of Cincinnati, in which the leasehold estate of Kueny was sold at public auction without limit or reserve by the said Superior

Court to Harry D. Brown, the bankrupt, who took possession and paid rent.

Fourth. Again, after the receiver in bankruptcy took hold, after the trustee had been chosen by the creditors and qualified, after the trustee had elected to take absolutely the leasehold estate for the purposes of sale, and after these very proceedings had been instituted to quiet the title preparatory to a sale, the lessors received rent from the bankrupt estate through F. R. Williams, receiver, and F. R. Williams, trustee, without objection. Thereby, they waived their right of forfeiture and the trustee can sell free from such right of forfeiture.

Fifth. There is no provision in the lease for a right of forfeiture by reason of a sale in bankruptcy, and, therefore, even though all other provisions of the lease were preserved, this sale would not entitle the lessors, appellants, to forfeit the lease if the trustee sold.

FIRST.

THE DISTRICT COURT HAD JURISDICTION AND COULD MAKE THE LESSORS, THE APPELLANTS, PARTIES TO THIS ACTION TO DETERMINE THE MATTERS IN CONTROVERSY.

Chapter 2, Bankrupt Act, Sec. 2, provides:

> "That the courts of bankruptcy as hereinbefore defined, viz., the District Courts of the United States in the several states, are hereby made courts of bankruptcy and are hereby invested, with their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation chambers and during their respective terms, as they are now or may be hereafter held."

Sec. 2, pt. 6:

> "Bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy."

Sec. 2, pt. 7:

> "Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

Sec. 2, pt. 15:

> "Make such orders, issue such process and enter such process in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act.
>
> "Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

It is conceded that the trustee is in lawful possession of the property in controversy, but the claim is made that such possession is for a limited purpose only—that is, that while he can hold the leasehold property indefinitely he can not utilize it in the only way that a trustee can utilize property—that is, convert it into cash for distribution to the creditors.

This is clearly a matter in controversy with relation to the most essential duty of the trustee, that of collecting, reducing to money and distributing the estate in his hands, and it can only be determined by the presence of the parties who raise the controversy.

It is no different from the numerous cases of contests as to the character of the possession of the property claimed by third parties which would ordinarily be the subject of the proceedings in the nature of replevin, which have come to be called petitions for reclamation.

Whitney vs. Wenman, 198 U. S., 539.
First Nat. Bk. vs. C. T. & T. Co., 198 U. S., 280.
White vs. Schloerb, 178 U. S., 542.

The district court had the power to bring in and substitute additional parties when necessary for the complete determination of the matter in controversy, realize on this valuable asset of the estate by converting it into money and then distribute it among the creditors.

Hewitt vs. Berlin Machine Works, 194 U. S., 296.
York Mfg. Co. vs. Cassell, 201 U. S., 344.
Mueller vs. Nugent, 184 U. S., 1.
Bryan vs. Bunheimer, 181 U. S., 188.

In view of the decisions of this Court, I submit that the district court had jurisdiction to bring in and substitute the additional parties, the lessors, the appellants, in order to determine the matters in controversy in this bankruptcy proceeding.

SECOND.

THIS WAS A PROCEEDING IN BANKRUPTCY TO DETERMINE THE RIGHTS AND CLAIMS OF THE LESSORS AND THE TRUSTEE AS TO THEIR RESPECTIVE INTERESTS IN THE LEASEHOLD ESTATE OF THE BANKRUPT, AND WAS IN THE NATURE OF A PROCEEDING TO QUIET THE TITLE THERETO IN THE TRUSTEE.

This proceeding was instituted on March 1, 1906, by the trustee against all the persons claiming interests in this leasehold estate. In order that the trustee might place a well-defined and clear title in any purchaser, he filed his proper plea, making the lessors, the appellants, and the mechanics lienholders, parties defendant by order of the lower court. Summons were issued and the various parties answered, including the appellants, but the only issues for review are between the

lessors and the trustee. This proceeding is like a suit to quiet title. The trustee has possession and is conceded by the lessors, the appellants, to have absolute possession, having elected to take the lease with its value and terms with the full intention to sell it pursuant to the appraisement made by the appraisers of the district court.

The Revised Statutes of Ohio, Sec. 5779, provide for a proceeding to quiet title as follows:

> "An action may be brought by a person in possession, by himself or tenant, of real property, against any person who claims an estate or interest therein, adverse to him, for the purpose of determining such adverse interest."

Here the trustee claims an estate in this leasehold for a fixed period free from certain conditions or covenants and that he can transfer it to a purchaser without the consent of the lessors; whereas, the lessors, the appellants, claim that, although the ~~lessors~~ trustee can hold it as long as the lease runs, free from the rights of forfeiture set forth and quoted fully above, but if he sells and transfers it, they, the lessors, can step in and take possession and oust the purchaser. This Court can readily see that if the trustee made any attempt to transfer it with this cloud hanging over his title, he would realize little or nothing for it; whereas, if it is freed from such right of forfeiture, he would no doubt realize the full appraised value, $10,000, or more.

The Supreme Court of Ohio had a case very similar to this in an action brought by a person claiming a fee when there was another party claiming he had only a life estate. The claim in that case was, like this, of adverse title.

Rhea vs. Dick, 34 O. S., 420.

In an application made by a trustee under the English bankruptcy act in the case of in re Riggs, 2 K. B., 16 (1901), the court had to determine the rights of the trustee in a certain lease involving questions of similar import—a proceeding to quiet title.

In a case in Michigan the Supreme Court of that state had before it a bill very similar in character to the proceeding instituted in this bankruptcy case. It was a suit brought by the lessor to have the court declare whether or not his forfeiture was complete, because the lessees would set up certain claims that it was complete, and in that case the court held that it was a proper suit in equity to quiet the title.

Pendill vs. Union Mining Co., 64 Mich., 172, 179.

In the case at bar we have just the reverse purpose, in that the trustee in bankruptcy, acting for the creditors, has brought a proceeding to quiet the title in him as trustee, and that the respective rights in the leasehold estate between himself and the lessors be determined.

Since this case was tried before the referee this Court has had under consideration a bill brought by receivers ancillary to the original bill to determine whether or not the city of Chicago could exercise a

certain right of forfeiture on the 30th day of July, 1903. This Court saw in that case, as it must in this case readily see, that until the respective rights are determined between the parties, there is a serious question as to whether or not the trustee has any title that he can convey so as to realize the value for the creditors. In the Chicago case the receivers, in order to determine their claims against the city of Chicago, brought an ancillary bill to determine their rights as against the city's rights in the franchise for the operation of the street railway system in that city. This Court, deciding the case in favor of the receivers that such a bill could be maintained to remove the cloud from the title, cite numerous authorities, and held:

> "Without going into further detail upon this branch of the case, we think that the latitude and claims of the city cast a cloud upon the title to this property, which was in the hands of the receivers to be administered under the orders of the court, and that in such case the receivers may with the authority of the court, proceed by ancillary bill to protect the jurisdiction and right to administer the property, and to determine the validity of the claims of the parties which cast a cloud upon the franchises and rights claimed by the companies and the receivers."
>
> Blair vs. Chicago, 201 U. S., 400.

I therefore submit, in accordance with the foregoing authorities, that this was a proper proceeding to quiet title between adverse claimants and that the lower court was justified in considering it, and the bankruptcy court had jurisdiction in such matters.

THIRD.

IF THE DISTRICT COURT HAD JURISDICTION, THEN THE LESSORS HAVE LOST THEIR RIGHT OF FORFEITURE, IF A SALE IS MADE BY THE TRUSTEE IN THESE PROCEEDINGS, BY REASON OF THE ACTION INSTITUTED BY THE LESSORS, THE APPELLANTS, IN THE SUPERIOR COURT OF CINCINNATI, IN WHICH THE LEASEHOLD ESTATE OF KUENY WAS SOLD AT PUBLIC AUCTION WITHOUT LIMIT OR RESERVE BY THE SAID SUPERIOR COURT TO HARRY D. BROWN, THE BANKRUPT, WHO TOOK POSSESSION AND PAID RENT.

If the lessors had a right to insist on a forfeiture they have waived it by their subsequent acts and conduct since the right of forfeiture arose.

The owners of this leasehold estate, the parties now contesting, brought a suit in April, 1904, in the Superior Court of Cincinnati, Hamilton County, Ohio, a court of competent jurisdiction, to sell this property; it was advertised for sale and was sold at public auction without limit or reserve, in July, 1905, and it was bid in by Mr. Brown

(Record, pp. 7, 8). Subsequent thereto Mr. Brown paid rent on the property up to the time of the proceedings by the creditors (Record, pp. 6-10). In view of these acts of the lessors they have no right of forfeiture whenever the trustees desires to sell.

The original leading case on the subject of conditions and covenants in leases is Dumpor's Case, 4 Coke, 119; 1 Smith Leading Case, 95, 117.

All subsequent decisions on this subject ultimately reach back to this old case as the basis for the law as it stands today.

Taylor on Landlord and Tenant, Sec. 287, 407, 498.
Murray vs. Harway, 56 N. Y., 339.
Lloyd vs. Crispe, 5 Taunton, 249, 253.
McGlynn vs. Moore, 25 Cal., 384.
Deaton vs. Taylor, 90 Va., 209, 295.

The most recent textbook in existence on the subject of landlord and tenant, and which has been published since the first of January, 1906, is the work of Jones on Landlord and Tenant. At Sec. 471 of this work he says:

> "In the United States the rule in Dumpor's case, while subject to some criticism, has generally been received as settled law, though in many of the cases where the topic arises no actual decisions upon the precise point was necessary."

Sustaining this proposition in the memorandum of authorities which I submitted to the court at the hearing below, I cited several cases. Many of them are very recent, and I especially direct the Court's attention to the decision of the New York Court of Appeals, in the case of Conger vs. Duryea, 90 N. Y., 599, wherein the court stated:

> "A single condition dispensed with is dispensed with forever. Receiving rent after forfeiture waives the forfeiture and affirms the lease, freed from the condition. Thus, where the condition is that the tenant shall not assign the lease and he does assign it, and the landlord with knowledge of the assignment accepts the rent, he affirms the lease without its condition and the assignee of the tenant may assign."
>
> Conger vs. Duryea, 90 N. Y., 599.

The New York Court of Appeals in the very recent case of Smith vs. Rector of St. Phillip's Church, 107 N. Y., 610 (14 N. E. Rep., 828), concurring in the view originally expressed in Dumpor's case, approved it as good law.

I desire to direct the Court's attention to two very recent cases from Massachusetts, the syllabus from one of which is as follows:

> "A assigned the lease to B with consent, B assigned the lease

to C without the consent of the lessor. Held that the condition was waived by the lessor's acceptance of the rent from C."

Porter vs. Merrell, 124 Mass., 534.

In another case only a few numbers before the case just referred to from Massachusetts, the Supreme Court of Massachusetts laid down the principle exactly as I insist it should be laid down in this case, wherein it has stated, and in the opinion Justice Horace Gray, afterwards of the United States Supreme Bench, concurred, as follows:

"A condition in a lease that the lessee or his legal representatives can not alien without the consent in writing of the lessor is determined by an alienation with such consent and no subsequent alienation is a breach of the condition."

Pennock vs. Lyons, 118 Mass., 92.

While this proposition may strike opposing counsel as extraordinary, he is not alone in his wonder, for Lord Eldon says:

"Though Dumpor's case always struck me as an extraordinary one, it is the law of the land at this day."

He further says:

"My opinion, therefore, without considering the particular terms of the assignment, is that this assignee has the power of assigning without license."

Brumell vs. Macpherson, 14 Ves. Jr., 175, 176.

The purpose of such limitation in a lease that it was not to be transferred, assigned or sold may be considered to be twofold; first that the new tenant may be morally objectionable to the landlord, or, second, he may be financially objectionable to the landlord. I admit that if the clients of the opposing counsel had taken advantage of the forfeiture provision in their lease when it was sold by the Superior Court of Cincinnati, whether it related to an assignment without their consent or through a transfer of the property to Mr. Brown through legal process without their consent, the Court would have upheld them in their contention. They not only did not do that, but were the parties to bring the suit; alleging that rent was due them; asking that the property be sold; that a receiver take charge and preserve the property for sale. They consented in writing, as is stated in the entry appointing the receivers, that these receivers should take hold for the purpose of selling this property. This was certainly a sale in the Superior Court through legal process, that can not be disputed. This is not a continuing condition I submit on the authorities herein cited. When these very owners instituted the proceedings to sell Kueny's leasehold estate and did not take advantage of their forfeiture clause, the law will either construe them to have waived such a condition of the right of forfeiture through a legal process or that they are now estopped.

If the Court will examine the advertisement (Record 14) it will see that this was a sale at public auction where no restrictions were placed on the sale by the landlord, the plaintiff in the case. Every one was at liberty to bid for this property. It was sold at public auction after various attempts had been made to sell it at private sale; certainly they are estopped from exercising this condition now through the proceedings in the Superior Court.

The counsel for the lessors, the appellants, admit that the trustee is in lawful possession of the property as trustee and has elected to take under the lease and make no claim that his title has been affected by the condition as to re-entry,

> "If said lessee shall assign this lease or underlet said leased premises or any part thereof . . . without the written consent," etc.

It is conceded that the adjudication in bankruptcy passes the title to the leasehold by operation of law to the trustee, provided he elects to take as in this case, and is in no sense an assignment, even if the condition is regarded as still in force in the lease and applicable to assigns. The condition, however, as to assignment is in terms a single and indivisible ones that "*if said lessee shall assign,*" and there is no mention of the word assigns with relation to this condition. It plainly can refer only to the lessee, and it can hardly be contended that it refers to an assignment by any one other than the lessee in the original lease, Joseph D. Kueny.

So far as the covenant of the "lessee for himself and for his . . assigns . . that he will not assign this lease nor underlet said premises without the written consent of said lessors" is concerned, it is in the first place no part of the condition and therefore can not affect the title of the trustee nor any assign from the trustee, but it too is a covenant that the lessee will not assign, and does not refer to the assignment of any interest of an assignee. Covenants to not assign do not run with the land, not being covenants touching and concerning the land at all.

The covenant to repair or insure on or before a time certain, or forthwith, to pay a gross sum as rent for the term, or not to assign the lease, and others of a like character, are not continuing covenants, because the parties contemplated by such covenants to provide for the doing or omission of a single act.

Farmers L. & T. Co. vs. P. P. Glass Co., 186 U. S. 453.

As the Supreme Court of California has said:

> "The distinction between the two classes of covenants is well illustrated by the covenants against sub-leasing, and against the assignment of the term. If the lessee assigns contrary to his covenant, it is a breach once for all; but a forfeiture accrues to the lessor each time the lessee sub-leases the premises contrary to his

covenant. If the lessee should after his assignment, contrary to his covenant, procure a re-assignment of the lease to himself, a forfeiture would not be worked by his assignment the second time."

McGlynn vs. Moore, 25 Cal., 395.
Dougherty vs. Matthews, 35 Mo,. 520.

The consent to this breach and the waiver of it are admitted by the lessors, who claim, however, that the condition is a continuing one, binding upon all holders of the leasehold estate, and that, although waived as to Kueny, it had not been waived as to his successors.

The condition referring to the "lessee interest" refers as clearly only to the lessee Kueny as does the condition as to the assignment by the lessee, and therefore when that condition has been waived by the lessors as to Kueny it disappears from the lease. The words of the condition following, "if said lessee or assigns shall fail to keep any of the other covenants of this lease by said lessee to be kept," the first condition in which assigns are mentioned, clearly indicate that it is those covenants which necessarily go with the occupancy under a lease, such as to "pay said rents," not to "suffer any waste," and to return the "said premises in as good order and condition as they now are," etc., that are to bind all successors of the lessees, as distinguished from the conditions that have express reference to the personality of the lessee, Kueny, those against assignment and the sale of the lessee interest under execution. If such is the case, the application to sell, which is practically a consent to an assignment, and the waiver of the sale have eliminated that breach and that condition, and the purchaser, Brown, takes the leasehold, not as a lessee but as the purchaser of the lessee's interest, subject to the conditions in the lease that naturally go with it by the terms. Had it been the intention to continue the restriction as to assignment and as to sale under execution, the lessors should have re-entered in the first instance and then made a new lease with Brown or such tenant as they desired to accept.

The condition is as single and indivisible as a condition that if the tenant shall cut down a certain tree or remove a certain building which, once cut down or removed, are gone forever. It is not the "lessee interest" that the trustee in bankruptcy desires to sell—that has already been sold—it is the interest of Brown, the bankrupt, the purchaser and successor of the lessee by consent of the lessors—an entirely different interest.

Doe exdem. Cheere vs. Smith, 5 Taunton, 795.
Philpot vs. Hoare, 2 Atk., 219.
Doe vs. Bevan, 3 Maule & S., 353.
Washburn Real Prop. (6th Ed.), Sec. 649.
Taylor on Landlord & Tenant (9th Ed.), 501, 410 and 286.
Tiffany Real Property, 72.
Winter vs. Dumerque, 12 Jur. N. S., 56.

The law should estop them for other reasons—namely, that having waived their right of forfeiture through sale by legal process, by their conduct one of the parties to this litigation has loaned a large sum for the purpose of reconstructing this building, and others have furnished material and performed labor on the building cognizant of such legal estoppel existing.

The principles of law applicable to a forfeiture always will be construed so as to prevent rather than aid a forfeiture.

Sauer vs. Meyer, 87 Cal., 34.
Camp vs. Scott, 47 Conn., 336, 375.
Tate vs. Crowson, 6 Ere. L. N. C., 65.
Parks vs. Hays, 92 Tenn., 161.

"The court leans against forfeitures."
In re Pennewell, 119 Fed. (C. C. A.), 139, 141.

In a case in Nebraska the principle was defined that where the subject of the forfeiture is valuable improvements owned by the tenant, forfeiture should be even less favored, and unless compelled by an unbending rule of law, the court of equity would not enforce forfeiture of property of considerable value belonging to the tenant.

Estebrook vs. Hughes, 8 Neb., 496.

I submit, under the foregoing authorities, that the law is well defined as to this case, that when the lessors did not insist on their right of forfeiture at the time of sale at public auction without limit or reserve by the Superior Court of Cincinnati, Ohio, and by taking the rent from the purchaser, Brown, the bankrupt, that the right to exercise the forfeiture through any subsequent sale or assignment, as lessors claim they can do, has been waived forever and the trustee can make a sale free from any such claim.

FOURTH.

AGAIN, AFTER THE RECEIVER IN BANKRUPTCY TOOK HOLD, AFTER THE TRUSTEE HAD BEEN CHOSEN BY THE CREDITORS AND QUALIFIED, AFTER THE TRUSTEE HAD ELECTED TO TAKE ABSOLUTELY THE LEASEHOLD ESTATE FOR THE PURPOSES OF SALE, AND AFTER THESE VERY PROCEEDINGS HAD BEEN INSTITUTED TO QUIET THE TITLE PREPARATORY TO A SALE, THE LESSORS RECEIVED RENT FROM THE BANKRUPT ESTATE THROUGH F. R. WILLIAMS, TRUSTEE, WITHOUT OBJECTION. THEREBY THEY WAIVED THEIR RIGHT OF FORFEITURE, AND THE TRUSTEE CAN SELL FREE FROM SUCH RIGHT OF FORFEITURE.

By accepting the rent from the trustee, who had previously elected to take, and started these proceedings to sell, they (the appellants) waived their right of forfeiture:

Taylor on Landlord & Tenant, Sec. 497 and 498, and authorities cited therein.
Wilder vs. Eubank, 21 Wend., 587.
Garnhart vs. Finney, 40 Mo., 449.
The Elevator Case, 17 Fed., 200.
Warner vs. Cochran, 128 Fed., 553.
Hasterlik vs. Olson, 75 N. E., 1,002 (Ill.).
Fleming vs. F. H. Co., 61 Atl., 157.

I claim that the sole purpose of the trustee in bankruptcy is to collect the assets of the bankrupt, convert them into money and distribute them among his creditors. The landlords never took advantage of the forfeiture clause by reason of legal process in the Superior Court, and I submit that by their conduct since these proceedings were instituted in bankruptcy they would be again estopped from taking advantage of this forfeiture clause for a sale through legal process. For, though I may concede that the holding of the receiver is temporary, and though he paid rent to the landlord, the holding of the trustee in bankruptcy now has been defined to be an election of the right to take for others interested in this property. Prior to the first day of March, 1906, these very proceedings, supplementary to the original proceedings, were filed in this case to complete the converting the bankrupt's property into money through sale. The placing of the property in the hands of the trustee in bankruptcy is for the purpose of sale. The title is vested in him when he elects to take any portion of the property for the purpose of sale. After these proceedings were instituted, March 1, 1906, and after the summons were served, the lessors, the appellants, demanded and received rent, as is undisputed, and placed no conditions therein. (Receipt, March 5, 1906, Record 10.) I submit that for this reason the lessors, the appellants, should be estopped from exercising any right of forfeiture under their lease.

FIFTH.

THERE IS NO PROVISION IN THE LEASE FOR A RIGHT OF FORFEITURE BY REASON OF A SALE IN BANKRUPTCY, AND, THEREFORE, EVEN THOUGH ALL OTHER PROVISIONS OF THE LEASE WERE PRESERVED, THIS SALE WOULD NOT ENTITLE THEM TO FORFEIT IF THE TRUSTEE SOLD.

By a person being declared a bankrupt I submit under the terms of the lease, whose provisions have been heretofore quoted, the lease is not forfeited.

In re Ells, 98 Fed., 967. (Lowell, J.)

Under the foregoing decision the court says there is no distinction between the old bankruptcy law and the new bankruptcy law on this subject. While there is a diversity of opinion on this subject, the weight of authority seems to be that the lease is not terminated, unless the trustee does not desire to hold it as a part of the estate or unless the landlord has the property turned over to him voluntarily, either through his own act or the act of the trustee.

In re Pennewell, 119 Fed., 139. (C. C. A.)
Loveland on Bankruptcy, 165 and authorities cited therein.
In re Houghton, 1 Lowell, 554.
Farnum vs. Hafner, 79 Cal., 580.
Smith vs. Putman, 3 Pickering, 221.
Doe vs. Bevan, 3 M. & S., 353
The Elevator Cases, 17 Fed., 200.
Gregg & Landis, 21 N. J. Eq., 494, 501 bot.

Suppose for the sake of argument that proposition fourth is not good, then I submit that when the title of the property which was originally in Brown was assumed by the trustee and he started his proceedings to quiet the title to sell the same, then the title did not pass by operation of the bankrupt law, but by the trustee's own election. Then the title which the trustee was conveying was the trustee's title. He is not attempting to convey any interest of Brown now, but his own title. No provision was made in the forfeiture clause of the lease against a sale in bankruptcy and a sale in such proceedings could not be construed to mean a sale through legal processes. In the case of

In re Ells, 98 Fed., 967,

they had the specific provision against a sale in a bankruptcy court, and the English Statutes and decisions have special provisions covering the English Bankruptcy Act. The sale of the trustee will be a title which he owns and holds, and the purchaser will take not from Brown, but from the trustee.

According to the theory of the argument of counsel for appellants, the trustee takes and has a right to sell only the title that the bankrupt possessed. If this argument were true in all of its details, then the sale by the trustee could not be a sale by legal process, but a sale in bankruptcy as distinguished from a sale by legal process, without having made any provision in the lease against a sale by a trustee in bankruptcy. As there is no provision for forfeiture for such a character of sale, which according to their theory is neither an assignment by lessee, nor a sale by legal process, then they would have no right of forfeiture.

I submit under this contention the trustee should be allowed to sell free from any forfeiture.

SIXTH.

ANSWER TO ARGUMENT FOR APPELLANTS.

Since the above brief was dictated and written, I have been served with a type-written copy of the brief that counsel for appellants propose to, and no doubt will, file in this Court.

I notice on examination of the brief, which is to be afterwards printed and filed, that it abandons, so far as that argument is concerned, further discussion of propositions first and second of my brief with reference to the jurisdiction of the court and the character of the proceedings. I do not know whether they intend to file any additional brief on this subject, or make any addition to their present type-written brief, but anticipating that they may, as they have not expressly abandoned them, I have covered propositions first and second, in order to meet such a contingency. If they abandon the argument with reference to the jurisdiction and the character of the action, either orally or in some subsequent brief, then I have nothing further to add on the subject, except as given under propositions first and second on the merits of the case.

After counsel for appellants have passed over the nature of their proceedings, they reduce their argument to two propositions. The first of these propositions with reference to the validity of a provision in a lease for forfeiture by reason of alienation, I do not dispute. I do dispute the second proposition, especially, when it is based on the facts as he attempts to give them.

Proposition three, four and five of my brief for the appellee cover the reply to their argument largely, but I desire to direct the attention of the court to certain special facts.

The court will notice on reading the order of sale made in the Superior Court (Record 14), that it was a sale at public auction without limit or reserve. A sale at public auction is a competitive sale made without limit or reserve to the highest bidder. Therefore, the purpose for whch the provision is put in the lease about assigning or selling the same by way of a legal process has been eliminated. A public auction allows any one to bid, who will pay the highest price and the auctioneer has to accept him, if he puts up the money covering the amount of his bid. It is immaterial whether he may be responsible morally for the proper conduct of the place or financially for future rent, which are the only purposes for which the provision is made in a lease, that it cannot be assigned or sold under a legal process or execution, without a written consent of the lessors, the appellants. By such a sale, as heretofore urged, there being no provision in the decree that the purchaser

must be acceptable to the landlord, the appellants, before such a sale becomes binding, this contention is thoroughly in harmony with the decree and the proceedings. If the appellants had intended to make any such reservation, it should have been made in the order of a sale, but none was made that they were to have the right to determine, who should be the tenant. The sale being made in the way that it was, nullified all the terms, covenants and conditions, whichever they may be called, with reference to assignments or sale under legal process.

As to the nature of this sale by the Superior Court of Cincinnati, counsel for appellants only cited one case, Kew vs. Trainer. He has abandoned the numerous authorities cited on this proposition in the lower courts, for the reason that they favored my contention. An examination of his only case will disclose the fact that there was a special license made by the landlord for the assignment, with the distinct understanding that it apply to only one person, and was therefore limited and could not be taken advantage of by any one else. The line of reasoning in that case would have no application to the present case, because of the fact that there was no restriction or stipulation in the sale at public auction, when Mr. Brown, the bankrupt, bought.

Again, I submit that the holding of the Circuit Court of Appeals is not in the least at variance with the case of York Manufacturing Company vs. Cassell or any other case cited by appellants, as to the nature of the trustee's leasehold. The cases in his brief were thoroughly familiar to the Circuit Court of Appeals before it rendered its decision in this case, and the decision of the Circuit Court of Appeals in this case is thoroughly in harmony therewith. The law is clear that when Brown became a bankrupt, that the trustee did not have to accept the lease, so that the trustee is not bound in the same way that Brown was, because Brown was bound with the obligations of the lease and had to fulfill it. It was optional with the trustee whether or not he would accept the leasehold estate, owned by Brown, and when he did accept it, it was accepted with the purpose of sale and with the purpose of making use of it for the benefit of the bankrupt estate. When the trustee did accept it and paid rent after these proceedings had been instituted to sell and the rent was accepted, as shown by the receipt (Record 10), without any stipulation opposed to his right, then he certainly occupied an entirely different relation from what Mr. Brown did to the appellants, before Brown became a bankrupt.

In this case there was no claim of fraud, and were a fraud practiced upon the landlord, the appellants in this case, the court would be justified in holding so. The proceeding of the trustee to convert the property into money was filed, summons were served regularly on these parties in this proceeding, that he intended to sell, and after the summons was served the rent was paid without objection and knowing such condition.

It is not an assumption that the trustee in bankruptcy holds the

property for the purpose of sale, but it is a fact that that is the purpose—namely, that it shall be converted into money and distributed among the creditors. Especially does this apply to a leasehold estate, because the trustee has the right to not accept the leasehold estate, if he so desires, or to accept, if he so desires. If he refuses to accept, it is evident that it is not a valuable asset. If the trustee does accept, it is evident that it is a valuable asset, and that he intends to use it, realizing a money consideration therefor. He would have no purpose in accepting it and becoming bound for the term, if it was not for the purpose of selling it.

The reasoning of the Circuit Court of Appeals, as contained in its opinion in the record, is clearly justified, and this Court would be justified in affirming it in accordance with its opinion.

However, if that opinion should not be held to be good law, I submit on the other propositions urged in this brief, namely, that by reason of the proceedings in the Superior Court of Cincinnati, the right of forfeiture was waived or by reason of the proceedings in this court, the service of summons and the acceptance of rent after these proceedings without objection, as is shown by the receipt, the right of forfeiture was waived and the trustee should be permitted to sell, free from any right of forfeiture on the part of the appellants.

I respectfully submit that the judgment of the Circuit Court of Appeals, if the Court shall consider the case at all on its merits, should be affirmed.

PROVINCE M. POGUE,
Of Counsel for Appellee.

Cincinnati, Ohio, Dec. 28, 1907.